BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Order Instituting Rulemaking to Consider Adoption of a General Order and Procedures to Implement the Digital Infrastructure and Video Competition Act of 2006	R.06-10-005

COMMENTS OF THE UTILITY REFORM NETWORK ON OPINION RESOLVING ISSUES IN PHASE II

September 13, 2007

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Pursuant to the Article 14 of the Commission's Rules of Practice and Procedure, The Utility Reform Network ("TURN") submits these comments on the Opinion Resolving Issues in Phase II ("Proposed Decision" or "PD").

I. THE PD ERRS IN NOT REQUIRING REPORTING OF SPECIFIC TECHNOLOGIES AND SPEEDS

The PD correctly requires video franchise holders with less than 1 million lines to provide additional reporting of customer use of wireless broadband.[1] However, the PD errs in that it failed to require the reporting of the use of other types of technology to deliver broadband service and, at least as importantly, in failing to require reporting by speed. Requiring reports to be provided solely for wireless use, with no indication of the

[1] Opinion Resolving Issues in Phase II (Aug. 24, 2007) ("Proposed Decision" or "PD"), pp. 22-24.

actual speed of the service available is insufficient to meet the requirements of DIVCA. The PD must be modified to correct these defects.

P.U. Code § 5890 (j) (4) states that if a franchise holder is utilizing more than one technology to provide service, "…the technologies shall provide similar two-way broadband Internet accessibility and similar video programming."[2] Absent data concerning the technology used to deliver service and the speed of the service, the Commission – and the Legislature – have no means of determining whether, in fact, a franchise holder is complying with the law. The PD failed to address this issue. Instead, it justified rejecting these proposed requirement by indicating that reporting should not constitute "a heavy burden" on franchise holders.[3] Nonetheless, the PD did require reporting about use of wireless broadband by customers, justifying these reporting requirements by noting that the collection of such data will help guide the Commission's policies aimed at increasing investment in broadband infrastructure and closing the digital divide. TURN submits that the usefulness of this data would be greatly enhanced if policy makers also obtained information about the upload and download speeds available from the broadband wireless services being reported. All wireless is not equal. Requiring reporting on speeds and all other broadband technologies used would be equally important in guiding state policy. Absent such reporting, the Legislature would have inadequate information upon which to determine whether the policy objectives set forth in DIVCA were being achieved. A franchise holder who does not provide any wireless service would provide no information at all about the deployment of service in

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[2] Phase II Opening Comments of California Community Technology Policy Group, Latino Issues Forum and The Utility Reform Network (May 31, 2007), p. 4 ("Joint Consumers".

[3] PD, p. 22.

its territory. If there is no reporting of speed, the Commission and the Legislature would have no way to judge whether the service provided to customers in different locations was, indeed, "similar" as required by statute. This would constitute the "see no evil" approach to policymaking – we have no data, so as far as we can tell, everything is hunky dory.

One way of reading the PD is that the intent is to not require *any* carrier reporting about the *actual deployment of facilities*. The wireless reporting focuses on "customer use", which implies that the Commission may attempt, or permit carriers, to rely solely on survey data to fulfill the requirements of DIVCA. Limiting the reporting to wireless (with no data about speed or other technology), based on customer surveys with no hard data to back up survey information would be contrary to the statute as adopted and contrary to the intent of the Legislature.

The statutory language pertaining to both telecommunications and video franchise holders is replete with the theme that policies should be "technology neutral." As the PD itself points out, technologies will continue to evolve. The PD seems to imply that wireless is the only type of broadband technology that policy makers need concern themselves with. The Commission cannot know or predict what combination of technologies will be used to provide broadband to underserved areas. There could conceivably be services provided through combinations of fiber and wireless, for example. The PD's attempt to pick and choose one technology over another is inappropriate and does not comport with DIVCA. The PD must be modified to require reporting of all technologies used to provide broadband, and the speeds of the services provided.

II. TURN'S ARGUMENTS REGARDING INTERVENOR COMPENSATION MADE IN OUR APPLICATION FOR REHEARING ARE INCORPORATED BY REFERENCE HEREIN TO PRESERVE OUR RIGHT TO APPEAL

On May 4, 2007, TURN submitted a request for intervenor compensation for our substantial contributions to the Commission Decision ("D.) 07-03-014, the Commission's decision in Phase I of this proceeding. On April 4, 2007 TURN filed an Application for Rehearing of D.07-03-014. That Application is pending. As part of its Application for Rehearing, TURN asserted that the Commission committed legal error by holding, *inter alia*, that the Commission lacks statutory authority to grant intervenor compensation "in the video context."[4]

In the instant Opinion Resolving Issues in Phase II ("Proposed Decision" or "PD"), the Commission summarily dismissed TURN's request for intervenor compensation holding in Conclusion of Law ("COL") 10 that:

> Ordering Paragraph 25 of D.07-03-014 states: "No party shall be awarded intervenor compensation in a proceeding arising under DIVCA." This DIVCA rulemaking itself falls within the broad ambit of the holding in Ordering Paragraph 25. Therefore, the pending NOIs and TURN's request for compensation should also be rejected.[5]

Thus, the Commission ordered that:

> The notices of intent filed in Phase I of this Rulemaking 06-10-005 by Latino Issues Forum and Consumer Federation of California, and the request of The Utility Reform Network for an award of compensation for substantial contribution to Decision 07-03-014 are denied.[6]

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[4] See TURN's Application for Rehearing of D.07-03-014 (April 4, 2007), pp. 17-23.

[5] PD, Conclusion of Law ("COL") 10; also see footnote 39.

[6] PD, Ordering Paragraph ("OP") 3.

In order to preserve our legal rights for possible appeal, TURN reiterates both its objections and arguments made in our Application for Rehearing relating to the Commission's denial of any opportunity for intervenors to receive compensation in this proceeding. Given that the Commission's summary dismissal of TURN's request for intervenor compensation in the PD based on the same reasoning espoused in D.07-03-014, the arguments we made in the Application for Rehearing regarding the Commission's legal error are equally applicable to the instant PD and we incorporate them by reference.

September 13, 2007

Respectfully submitted,

/S/

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CERTIFICATE OF SERVICE

I, Larry Wong, certify under penalty of perjury under the laws of the State of California that the following is true and correct:

On September 13, 2007 I served the attached:

COMMENTS OF THE UTILITY REFORM NETWORK ON OPINION RESOLVING ISSUES IN PHASE II

on all eligible parties on the attached lists to **R.06-10-005**, by sending said document by electronic mail to each of the parties via electronic mail, as reflected on the attached Service List.

Executed this September 13, 2007, at San Francisco, California.

/S/

Larry Wong

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